

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }  
GILLETTE MACHINE & TOOL COMPANY }

Appearances:

For Appellant: John T. Riley, iittorney at Law

For Respondent: W.M. Walsh, Assistant Franchise Tax  
Commissioner; James J. krditto, Franchise  
Tax Counsel

OF \_IN \_ION

This appeal is made pursuant to Section 27 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner in denying the claim of Gillette Machine & Tool Company for a refund of tax in the amount of \$1,293.86 for the taxable year ended November 30, 1941,

On January 15, 1941, Appellant, a California corporation, filed its franchise tax return with the Commissioner for the taxable year ending November 30, 1941, disclosing tax liability in the amount of \$3,881.59 and paid the sum of \$1,940.80, that sum being the first installment of the tax. On January 21, 1941, the sole stockholder of Appellant executed his written consent to wind up and dissolve the corporation, and on January 23, a certificate of election to wind up and dissolve was filed with the Secretary of State pursuant to Civil Code Section 400. On January 31, 1941, the corporation executed a bill of sale transferring all its assets to the sole stockholder who continued to operate the business as an individual. A certificate of dissolution as provided for by Section 403c of the Civil Code was not filed with the Secretary of State, however, until August 19, 1941.

Appellant filed its claim for refund on the theory that the effective date of its dissolution was January 31, 1941, and that under Section 13(k) of the Bank and Corporation Franchise Tax Act its tax liability could be based only on the two months' period from November 30, 1940, to January 31, 1941. The question presented by this appeal is the meaning of the words "effective date of such dissolution" in Section 13(k). This section provides

"Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the months of such taxable

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"year which precede the effective date of such dissolution or withdrawal . . ."

The Franchise Tax Commissioner contends that the "effective date of such dissolution" was August 19, 1941, when the certificate of dissolution was filed. Section 403c of the Civil Code provided prior to 1943 for the filing of a certificate stating

" . . . that the corporation has been completely wound up, its known assets distributed, any tax or penalty due under the Bank and Corporation Franchise Tax Act paid . . . , and that the corporation is dissolved. Such certificate shall be filed in the Office of the Secretary of State, and a copy, certified by him, shall be filed in the office of the County Clerk of the county in which the principal office of the corporation is located. Thereafter corporate existence shall cease except for the purpose of further winding up if needed." (Underlining added.)

The other statutory provisions relating to the voluntary dissolution of a corporation are to be found in Sections 399, 400 and 400(a) of the Civil Code. Section 400 provides that any corporation may dissolve by vote or written consent of fifty per cent or more of the voting shareholders and that a certificate of election to wind up and dissolve shall be filed with the Secretary of State. Section 399 provides that the existence of a dissolved corporation shall continue for the purpose of winding up but not "for the purpose of continuing business except insofar as necessary for the winding up thereof.?"

A similar restriction on carrying on of business is imposed by Section 400a, applicable when proceedings for winding up have commenced. This Section further provides

When the winding up and dissolution of a corporation has been authorized by vote or consent of the shareholders, or members, or directors, such action may be revoked by similar vote or consent at any time prior to distribution of the assets n . . ." ( n g added.)

In Bank of Alameda County v, McColgan, 69 Cal. App. 2d 464, these provisions were construed by the District Court of Appeal in a suit involving a similar corporate dissolution. The taxpayer was a California bank whose permit to do business as a bank had been canceled on April 12th of the taxable year. Assets were distributed to its shareholders on April 13th and a certificate of election to dissolve was filed on or about April 25th. A certificate of dissolution under Civil Code Section 403c was not filed, but it was nevertheless held that the effective date of dissolution under Section 13(k) of the Bank and Corporation Franchise Tax Act was the time of the distribution of the corporate assets because the effect of such distribution was to make the decision to wind up irrevocable under Civil Code

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Section 400a. The Court stated that, "From a practical standpoint, a corporation may be considered dissolved when it irrevocably loses its right to do business other than that necessary to wind up its affairs." 69 Cal. App. 2d 464, 471. Neither certificate was held to effectuate the dissolution of the corporation. The certificate of election to dissolve was regarded as **only a** formal notice of intention to dissolve, while the certificate of dissolution was held to be merely the formal end of corporate existence designed for the convenience of the Secretary of State, the public and the protection of the directors. For tax purposes, the effective date of dissolution was held to be the date on which the corporation irrevocably lost its privilege of carrying on a corporate business, except for winding up, in view of the fact that the tax was imposed on that privilege.

The only distinction between the Bank of Alameda case and this appeal lies in the fact that there the permit to do business as a bank had been cancelled by the Superintendent of Banks. In view of the fact, however, that the Court reached its decision on the basis of the irrevocable nature of the corporate action after the distribution of assets, it follows that the position of the Appellant must be upheld upon the authority of that case.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in denying the claim of Gillette Machine & Tool Company for a refund of tax in the amount of \$1,293.86 for the taxable year ended November 30, 1941, pursuant to Chapter 13, Statutes of 1929, as amended, be and the same is hereby reversed. The Commissioner is hereby directed to give credit to said Gillette Machine & Tool Company for said amount of \$1,293.86 against any taxes due from it under the Bank and Corporation Franchise Tax Act and to refund the balance of said \$1,293.86 to said Company and otherwise to proceed in conformity with this order.

Done at Sacramento, California, this 18th day of September, 1946, by the State Board of Equalization.

Wm. G. Bonelli, Member  
J. H. Quinn, Member  
Geo. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary